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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Should the award of survivor's benefits under plans covered by the Employee Retirement Income Security Act ("ERISA") be controlled by the designation of beneficiary on file with the plan administrator?

(2) Does the extension of ERISA to nullify provisions of antenuptial agreements that expressly waive benefits arising from a previous marriage impermissibly intrude on an area of state domestic relations law?

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No. 92 -

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PETER HURWITZ,

Petitioner,

v.

JOAN LEAR SHER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petitioner Peter Hurwitz prays that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 28, 1992 concerning the effect of the Employee Retirement Income Security Act of 1974 on an antenuptial agreement signed by petitioner's father and respondent.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 982 F.2d 778 (2d Cir. 1992) and is reprinted in the Appendix to this petition, infra, at 1a-15a. The decision of the United States District Court for the Southern District of New York, reported at 789 F.Supp. 134 (S.D.N.Y. 1992) (Patterson, J.), is reprinted in the Appendix, infra, at 16a-28a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 28, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Section 404(a)(1)(D) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a)(1)(D), as amended, provides:

> **(a) Prudent man standard of care**
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and--

> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

2. Section 205 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1055(c)(2), as amended, provides:

> (2) Each plan shall provide that an election [of a waiver] under paragraph (1)(A)(i) shall not take effect unless--
>
> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.[1]

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[1] The related provision of the Internal Revenue Code, 26 U.S.C. § 417(a) (1988), mirrors this language.

3. Treas. Reg. § 1.401(a)-20 (1991) provides in pertinent part:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32 (a) **Application.** In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) **Conditions** . . . Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not nonspouse beneficiary, without obtaining the spouse's consent.

STATEMENT

A. Statement of Facts:

David Hurwitz was the sole participant in the Algonquin Press, Inc. Employee Profit Sharing Plan (the "Plan"), as well as the administrator of the plan. In 1988 David Hurwitz was divorced from his second wife and designated his son from his first marriage, petitioner Peter Hurwitz, as his sole beneficiary under the Plan. His second wife consented to this designation. This designation of petitioner was the only beneficiary designation on file when David Hurwitz died, less than nine months after his third marriage. (3a, 19a).

In January of 1990 David Hurwitz married respondent Joan Lear Sher ("Sher"). Before the marriage, David Hurwitz and Sher signed an antenuptial agreement in which each spouse renounced all marital rights in the other spouse's property. The agreement provided that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns all rights . . . which may arise by reason of the marriage between the parties and the present or future laws of any jurisdiction . . . as fully as though the parties had never been married . . . ." (3a). The agreement included a specific waiver of all rights which might arise by reason of any laws affecting the devolution of property at death, and provided for the parties to execute any further documents needed to effectuate the provisions of the agreement.

The agreement specifically identified the Algonquin Employee Profit Sharing Plan, the largest asset of David Hurwitz, as property in which Sher disclaimed any interest, and included a listing of all of the Plan's investments. Sher also released to David Hurwitz' heirs all rights in the Plan which could otherwise arise by reason of her marriage. As consideration for this waiver, David Hurwitz and his heirs disclaimed any interest in substantially greater financial investments belonging to Sher.

David Hurwitz died on October 5, 1990, less than nine months after marrying Sher. Despite her express waiver of any rights with respect to the Plan, Sher asserted a claim to the Plan and challenged the right of David Hurwitz's sole heir, Peter Hurwitz, to receive survivor's benefits under the Plan even though he was the designated plan beneficiary. On May 15, 1991, Peter Hurwitz, petitioner herein, commenced an action in New York State Supreme Court seeking a declaration that he was the sole beneficiary under the Plan. (16a). Sher removed the state court declaratory relief action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441(a) on the ground that federal law governed the disposition of the case. The federal district court had jurisdiction pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction), as well as under 29 U.S.C. § 1132(e) and (f) (conferring federal jurisdiction over actions by beneficiaries of employee benefit plans). In the district court Sher filed a counterclaim asserting that her own pre-marriage release of any interest in the Plan was not

an effective release of her interest in the Plan under Section 205 of ERISA, 29 U.S.C. § 1055(c). (17a)

B. The District Court and Court of Appeals Decisions:

In the district court both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court held that the antenuptial agreement could not constitute an effective waiver of spousal rights under ERISA because it was entered into before the parties were married. (24a). It also held that the antenuptial agreement did not contain provisions that it considered necessary to constitute a waiver under Section 1055. (24a-25a). Accordingly, it granted Sher's motion declaring her to be the sole beneficiary under the Plan. (28a).

The Court of Appeals did not decide the question of whether an antenuptial agreement could be rendered ineffective as a waiver of ERISA rights solely because it was entered into before marriage. (8a). Despite Sher's clear release of any interest in David Hurwitz' pension plan rights, the Court of Appeals held that the antenuptial agreement was ineffective. (8a-10a). Although ERISA has no provision dealing with the effects of antenuptial agreements on retirement plans that pre-date a marriage, the Court of Appeals assumed that the spousal protection provisions of Section 1055 that pertain to pension plans created during marriage should be applied. (7a). The Court of Appeals dis-

regarded entirely the plan participant's designation of Peter Hurwitz as the beneficiary of the Plan. The Court of Appeals erroneously interpreted the statute as requiring the antenuptial agreement to name the alternate beneficiary, even though Section 1055(c)(2)(A)(ii) sanctions general consent to beneficiary designations by a plan participant. In reaching its decision the Court of Appeals also relied upon regulations issued by the Internal Revenue Service which state that an antenuptial agreement can never constitute a waiver of employee benefit plan rights under ERISA. (11a-13a). Finally, despite the provision of the agreement in which Sher agreed to execute any further documents necessary to carry out the intent of the agreement, the Court of Appeals declined to order Sher to execute a document waiving Plan benefits in order to give effect to her release in the antenuptial agreement. (14a-15a).

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflicts in Principle that Exist Between the Decisions of the Second, Sixth and Seventh Circuits

The decision below conflicts in principle both with the Sixth Circuit's decision in McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) and with the Seventh Circuit's decision in Fox Valley & Vicinity

Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990). While the Sixth Circuit examines only the documents on file with a benefit plan administrator to determine whether or not there has been an effective waiver of spousal benefits, the Second and Seventh Circuits disregard altogether the beneficiary designations on file with plan administrators. These conflicts warrant review by this Court because of the uncertainty that administrators of ERISA plans are subject to in determining which claimants are entitled to receive retirement plan benefits.

In McMillan the Court of Appeals for the Sixth Circuit held that a designation of beneficiary on file with the plan administrator controlled the disposition of a pension plan, notwithstanding waiver terms in a divorce agreement by which each spouse relinquished "any and all" claims to the property of the other spouse. In McMillan the plan participant's ex-wife had been designated as the plan beneficiary before her divorce from the participant. 913 F.2d at 311. The designation naming her as the plan beneficiary in the event of the participant's death was not changed for four years after the divorce. During this period the participant remarried. After his death his then-spouse claimed a survivor benefit under his retirement plan, asserting that in the divorce the prior wife waived any rights under the plan. The Court of Appeals ruled against the current spouse because the first spouse was still designated as the beneficiary in the forms filed with the plan administrator.

The Sixth Circuit based its ruling on ERISA's requirement, codified in 29 U.S.C. § 1104(a)(1)(D) (1988), that a plan administrator must discharge his duties "in accordance with the documents and instruments governing the plan . . . ." Holding that this provision (rather than Section 1055) was controlling, the court held that the outstanding designation of beneficiary naming the first wife was controlling and declined to give effect to the waiver in the subsequent divorce agreement. 913 F.2d at 312. Citing Judge Easterbrook's dissenting opinion in Fox Valley, the Sixth Circuit concluded that exclusive reliance on the plan documents best fulfilled Congress' intent that ERISA plans be "uniform in their interpretation and simple in their application." Id.[2] The Court of Appeals for the Eighth Circuit in Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) also rejected a waiver of benefits in a divorce decree where a designation of beneficiary had not been changed following a divorce. Citing state common law pertaining to insurance policy beneficiaries, the Eighth Circuit held the waiver in the divorce decree ineffective because it did not revoke the earlier beneficiary designation. See 877 F.2d at 691-92.

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[2] The Sixth Circuit recently adhered to this approach in its unpublished opinion in Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. 1992), in which it rejected a waiver in an antenuptial agreement and held that filing of a new designation of beneficiary form was necessary to change beneficiaries.

In Fox Valley, however, the treatment of a designation of beneficiary by the Seventh Circuit was the opposite of that in McMillan. In Fox Valley, as in McMillan, a designation of beneficiary form naming the spouse remained unchanged and on file with the plan administrator after a divorce. The divorce agreement provided for waiver of each spouse's interest in the other spouse's retirement and pension plans. The Court of Appeals for the Seventh Circuit, sitting en banc and over the dissent of four judges (including Judge Easterbrook), ruled that the designation of beneficiary in the plan documents was not controlling and gave effect to the waiver in the divorce decree. 897 F.2d at 280-82. The dissenting judges emphasized the value of rules requiring payment of benefits to designated beneficiaries for achieving "simple administration" and rapid payment of benefits. 897 F.2d at 283.

In the case below the Court of Appeals for the Second Circuit failed altogether to address the designation form naming petitioner as the plan beneficiary. The Plan provided for the death benefit to be payable to the designated beneficiary as long as the participant's spouse had waived the right to be the beneficiary. Had the Second Circuit adopted the Sixth Circuit's approach and given controlling effect to the beneficiary designation pursuant to Section 1104(a)(1)(D), it would have held for petitioner instead of respondent, as the only beneficiary designation on file named Peter Hurwitz as the beneficiary. Although the court below expressed concern for ease of administration, its decision prevents plan ad-

ministrators from relying on beneficiary designations on file. Unless a national rule is established governing whether beneficiary designations or other documents that expressly waive plan benefits are controlling in determining who is a beneficiary, conflict in the administration of ERISA-governed plans will continue in accordance with the widening split of authority in the different circuits.

While the Seventh Circuit's decision in Fox Valley and the decision of the Second Circuit in this case both disregarded the existence of a designation of beneficiary, they are nonetheless in conflict with each other with respect to the requirements for waiver of spousal benefits under ERISA. In Fox Valley the court approved and gave effect to the waiver of spousal benefits in the parties' divorce agreement, even though that waiver did not contain the terminology of Section 1055(c)(2). The spouse's waiver in the Fox Valley divorce decree did not identify any alternate beneficiary and did not "acknowledge the effect" of the waiver. See 897 F.2d at 277. Nonetheless, the Court of Appeals for the Seventh Circuit gave effect to the waiver, holding not only that "ERISA allows beneficiaries to waive their interests in benefits", but also that "ERISA is silent on what constitutes a proper waiver" in a divorce decree. 897 F.2d at 279, 280. Unlike the Second Circuit, the Seventh Circuit did not consider the waiver requirements of Section 1055 to be applicable, even though the waiver was negotiated during the marriage, was signed by a spouse, and pertained to benefit rights earned during the marriage.

The court below sought to distinguish Fox Valley on the grounds that a "divorced spouse, unlike a current spouse, is not protected by the explicit terms of the statute." (14a). The purported distinction is unpersuasive at best and does not resolve the conflict between the circuits. Prior to marriage a prospective marriage partner who signs an antenuptial agreement is also not a spouse. Under this reasoning the statute is inapplicable to waivers made before marriage. Morever, notwithstanding a divorce, a divorced spouse who has contributed to the marriage that resulted in a pension plan is clearly within the class of persons whom Congress sought to protect. See Part II-A, infra.

Thus the Second Circuit's decision cannot be reconciled with the Seventh Circuit's opinion in Fox Valley. The core difference between the two decisions is that the Second Circuit and the Seventh Circuit have adopted sharply differing standards for an effective waiver of employment plan benefits. Certiorari should be granted to determine whether the Second Circuit's cramped interpretation of Section 1055 waiver provisions or the Seventh Circuit ruling accepting alternate forms of waiver best reflects Congressional intent in Section 1055.

II. The Court Below Decided an Important Question of Federal Law That Should Be Settled by This Court

The court below addressed a question of federal law that has not been decided by this Court, namely, whether ERISA nullifies antenuptial agreements by which a prospective spouse waives a right to employment plan benefits that the other spouse has earned before the marriage. Although presented with an antenuptial agreement that met the statutory requirements for waiver of a spousal interest in survivor's benefits under an employee benefit plan, the Court of Appeals erroneously denied effect to the antenuptial agreement on the ground that it did not contain the precise waiver terms set forth in ERISA. Under the interpretation of ERISA adopted both by the court below and by other lower federal courts, the ability of prospective spouses to keep their respective pension fund assets separate through antenuptial agreements is undermined. Since antenuptial agreements concerning property are enforceable in all state jurisdictions,[3] certiorari should be granted in

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[3] The Uniform Antenuptial Agreement Act has been adopted in the following state jurisdictions: Arizona (Ariz. Rev. Stat. §§ 25-201 to 25-205 (1991)); Arkansas (Ark. Code Ann. §§ 9-11-401 to 9-11-413 (Michie 1987)); California (Cal. Civ. Code §§ 5300-5317 (West 1985)); Hawaii (Haw. Rev. Stat. §§ 572D-1 to 572D-11 (1987)); Illinois (Ill. Ann. Stat. ch. 40, ¶¶

order to review whether ERISA should be interpreted in a manner which sweeps aside the domestic relations laws of fifty states.

A. The Statute Does Not Address Benefit Plan Waivers in Antenuptial Agreements

ERISA is silent with respect to the effect of provisions in antenuptial agreements that provide for

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2601-2611 (Smith-Hurd 1989)); Iowa (Iowa Code Ann. §§ 596.1 to 596.12 (West 1991)); Kansas (1988 laws, ch. 204; no statutory citation); Maine (Me. Rev. Stat. Ann. tit. 19, §§ 141-151 (West 1987)); Montana (Mont. Code Ann. 40-2-601 to 40-2-610 (1987)); Nevada (Nev. Rev. Stat. 123A.010 - 123A.100 (1989)); New Jersey (N.J. Stat. Ann. 37:2-31 to 37:2-41 (West 1988)); North Carolina (N.C. Gen. Stat. §§ 52B-1 to 52B-11 (1987)); North Dakota (N.D. Cent. Code 14-03.1-01 to 14-03.1-09 (1985)); Oregon (Or. Rev. Stat. 108.700 to 108.740 (1987)); Rhode Island (R.I. Gen. Laws §§ 15-17-1 to 15-17-11 (1987)); South Dakota (S.D. Codified Laws §§ 25-2-16 to 25-2-25 (1989)); Texas (Tex. Fam. Code Ann. §§ 5.41 to 5.56 (West 1987)); and Virginia (Va. Code Ann. §§ 20-147 to 20-155 (1985)). In addition, all other jurisdictions recognize and enforce antenuptial agreements concerning property rights as part of their common law tradition. See Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Calif. L. Rev. 204, 285 (1982); see, e.g., Gentry v. Gentry, 798 S.W.2d 982 (Ky. 1990); Panossian v. Panossian, 172 A.D.2d 811 (2d Dept. 1991).

a waiver of an interest in benefits under an employee benefit plan that belongs to the other prospective spouse before marrige. Accordingly, it is appropriate for federal courts to fashion federal common law rules in determining the effect of waivers of retirement plan benefits in antenuptial agreements. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980).

The court below, however, elected to apply in the premarital context waiver requirements that Congress enacted for already-married spouses. In 1984 Congress amended ERISA to provide for automatic survivor's benefits for spouses of vested participants in retirement plans. 29 U.S.C. § 1055 (1988), as amended by Pub.L. 98-397, 98 Stat. 1429. The purpose of this legislation was to protect the benefit rights of surviving spouses who made a contribution during marriage from loss of benefits under plans built up during a marriage. S. Rep. No. 575, reprinted in 1984 U.S. Code Cong. & Admin. News [USCCAN], at pp. 2547 & 2558. Congress also provided that such benefits could be waived by the spouse. 29 U.S.C. § 1055(c)(2) (1988). It required that a waiver of these benefits by a spouse "acknowledge the effect" of the waiver and include either the designation of an alternate beneficiary, or a general consent to further designations of beneficiaries by the plan participant. Id.

The court below erroneously applied the waiver requirements of this statute to antenuptial agreements even though such agreements are not referred to in the statute. The principal purpose of

antenuptial agreements is to ensure continued control by the respective spouses over the property that each has acquired prior to marriage. H. Clark, The Law of Domestic Relations in the United States, § 1.1, at 41 (2d ed. 1987). Prospective spouses who were not married to a participant in a benefit plan do not fall in the class of individuals whom Congress wished to protect in amending Section 1055. There is no indication in the statute (or elsewhere) that Congress intended to preclude prospective spouses from providing in antenuptial agreements that all of their respective property interests, including pension and benefit plan interests, would remain separate property not available to the other spouse. The opinion below erred in extending Section 1055 to be applicable to circumstances to which Congress did not contemplate its application.

In addition, the court below failed to recognize that if the statute is held applicable to antenuptial agreements, an interpretation of its provisions that is consistent with the Congressional purpose permits the general waiver that characterizes the subject antenuptial agreement. Although it should be abundantly clear that an antenuptial agreement can satisfy Congress' concerns whether or not it contains the precise terminology found in Section 1055, the court below effectively insisted on literal compliance with the terminology of the statute. The antenuptial agreement in the instant case readily fulfilled the requirements of the statute. Although it does not recapitulate the language of the statute, it is an

absolutely clear and knowing release of any and all rights that might otherwise flow from the Plan.

Respondent had the benefit of detailed disclosure, in writing, of all of the investments by the Plan. She was aware of the total dollar amount of the Plan, in which David Hurwitz was the sole participant, and expressly agreed to waive all marital rights of any kind that might at any time arise with respect to the Plan "as fully as though the parties had never married . . . ." While the benefits being waived were not formally identified as "survivor's benefits", this was immaterial since the agreement specified that respondent would have no property interest at all in the profit-sharing plan. The statute does not require a verbatim recital of its provisions; it requires that respondent show that she understands and accepts the decision to waive benefit rights. Respondent cannot contend that the agreement failed to disclose the scope of her waiver.[4]

Indeed, no stronger acknowledgement of the effect of the waiver can be imagined than the express statement, in a document that specifically included a

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[4] Respondents argued below that David Hurwitz was advised in 1988 when he designated petitioner as his beneficiary that a new spouse would have benefit rights unless she also waived such rights. The 1988 notice to David Hurwitz is not material, since the provisions of the antenuptial agreement expressly waived those rights.

list of Plan's assets, that respondent would have no marital rights in any of David Hurwitz' assets. In In re Estate of Hopkins, 214 Ill. App.3d 427, appeal denied, 141 Ill.2d 542 (1991), the court held that an antenuptial agreement that included an employee retirement plan in a schedule of spousal property being released was an effective waiver of benefit rights, even though the agreement did not specifically include the terms "benefits" or "beneficiary" in its description of the property rights being waived. By failing to uphold the equally clear waiver in the instant antenuptial agreement, the court below permitted a party who had knowingly waived all rights to her prospective husband's assets -- while protecting her own more substantial property -- to dishonor her own agreement and reap the benefit of a windfall, at the expense of the designated plan beneficiary.

Similarly, the antenuptial agreement constituted a general consent by Sher to David Hurwitz' designation of Plan beneficiaries. The agreement left each spouse full power to dispose of his or her property (which, as noted, was identified in the agreement) to his and her respective heirs. This provision of the agreement fully complied with the intent of Section 1055(c)(2)(A)(ii) to permit a spouse to give general consent to designation of alternate beneficiaries by a plan participant. In this subsection Congress contemplated that a spouse could expressly give general consent to "designations by the participant without any requirement of further

consent by the spouse" (id.) -- language which the court below failed to apply in interpreting the statute.

The effect of ERISA on antenuptial agreements waiving an interest in a spouse's pension plan or employee benefit plan is a matter of recurring concern in the lower federal courts, as well as in the state courts. See, e.g., Howard; Callahan v. Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan, 1992 U.S. Dist. LEXIS 20772, 20773 (W.D.Ky. 1992), appeal pending, Nos. 92-5796 et al. (6th Cir.); Nellis v. Boeing Co., 1992 U.S. Dist. LEXIS 8510 (D.Kan. 1992); Zinn v. Donaldson Co., Inc., 799 F.Supp. 69, 73 (D.Minn. 1992); In re Estate of Hopkins, supra. These plans often involve very substantial sums of money. The closely related issue of the enforceability of spousal benefit waivers in divorce settlement agreements as a result of Section 1055 has also occupied the attention of the federal courts of appeal. Compare Fox Valley, supra (upholding waiver of retirement plan rights in divorce settlement) with McMillan, supra (invalidating waiver of benefit plan rights in divorce settlement which did not refer to plan) and Lyman Lumber Co., supra (holding that divorce decree was not a waiver of wife's interest in ERISA-covered plan).

The application of Section 1055 to antenuptial agreements and the literal compliance with its provisions insisted upon by the court below undermines important domestic relations policies embodied in antenuptial agreements, despite the absence of any indication that Congress intended to supersede

these agreements by federal law. This Court has repeatedly held that federal courts should not disturb state family property law unless absolutely required to do so in order to preserve an express and clearly enunciated federal policy. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); United States v. Yazell, 382 U.S. 341, 352 (1966). The enforceability of the provisions of otherwise valid antenuptial agreements that pertain to spousal rights under employee benefits plans turns upon the applicability of Section 1055 to those agreements. Under the decision below, even a promise in an antenuptial agreement to execute documents necessary to give effect to the waivers in the agreement is unenforceable. As a result, negotiation of antenuptial agreements concerning the disposition of ERISA-covered assets is not feasible. Even if the statute is held to be applicable to antenuptial agreements, this Court should resolve the question of whether it must be given a rigid interpretation that vitiates antenuptial agreements whose intent clearly complies with the statutory purpose, but whose provisions do not contain textual provisions identical to those used by Congress in the statute.

B. The Internal Revenue Service Regulations Do Not Constitute a Reasonable Interpretation of the Statute

The court below both accepted and relied upon Treasury Regulations which flatly exclude antenuptial agreements from ever satisfying the consent requirements for a waiver of spousal benefits. See

Treas. Reg. § 1.401(a)-20 (1991), at "A-28" ("An agreement entered into prior to marriage does not satisfy the applicable consent requirements . . . ."). Although antenuptial agreements are recognized in all fifty states, according to this regulation all antenuptial agreements that specify the disposition of pre-existing pension and profit-sharing plans are invalid for these assets. This blanket rejection of antenuptial agreements is not based on any language in Section 1055, which is entirely silent as to the subject of such agreements. The regulation should not be given weight because it constitutes a drastic interference with the states' powers to regulate domestic relations where the words of the statute do not require such interference. Hisquierdo, supra.

Similarly, Question and Answer 32 (p.2 supra) of the regulations is inconsistent with the statute because it fails to permit general consent by a spouse to further designations of beneficiaries. See 29 U.S.C. § 1055(c)(2)(A)(ii). This portion of the regulation is at odds not only with the statute, but with IRS publications that do recognize that the statute permits general spousal consent to beneficiary designations by plan participants. IRS Pubs. No. 1565 and 1566, Looking Out for #2: A Married Couple's Guide to Understanding Your Benefit Choices at Retirement (1991) [published in two versions], at 29 and 25 (respectively).

Moreover, the blanket rejection of antenuptial agreements in these regulations fails to acknowledge that these agreements frequently contain the func-

tional equivalent of the waiver provisions in Section 1055. In In re Estate of Hopkins the court held that the Treasury regulation denying effect to antenuptial agreements as a waiver of ERISA benefits was "incorrect" and declined to follow it. 214 Ill. App.3d at 437. In the instant case the antenuptial agreement was as clear a waiver of spousal rights as there could be. Certiorari should be granted to review the propriety of regulations that appear plainly unreasonable under the legislation that they purport to interpret.

Although deference is to be accorded to the interpretation of a statute by an agency charged with its enforcement, see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1985), the extent of that deference is limited to the "clear meaning of the statute, as revealed by its language, purpose and history." IBT v. Daniel, 439 U.S. 551, 566 n.20 (1979). The agency's regulation must constitute "a permissible construction of the statute." Chevron, 467 U.S. at 842-43. Here neither the plain language of Section 1055 nor its legislative history indicate any intent whatsoever to displace antenuptial agreements. The Commissioner's blanket decision to exclude all antenuptial agreements as appropriate vehicles for a waiver of spousal rights and his failure to provide in the regulation for general consent to beneficiary designations as set forth in the statute are not a permissible construction of the statute and, as such, cannot be deferred to by the courts. See, e.g., Commissioner v. Engle, 464 U.S.

206, 224 (1984) (declining to defer to unreasonable position of Internal Revenue Service).

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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